

The Board considered the record and adopts the Stipulations listed in the Award. In addition, the Board considered the March 3, 2003 deposition of Albert E. Porter and the May 16, 2002 court ordered independent medical examination report of Vita Carabetta, M.D.

### ISSUES

Claimant alleges he injured his back, right leg, both arms, hands, and wrists “[e]ach and every working day beginning March 2001, and ending April 1, 2001.”<sup>1</sup> The ALJ denied benefits, finding claimant failed to give timely notice of accident. Claimant contends this was error and that he is entitled to an award of permanent partial disability compensation based upon a 62 percent work disability.

Respondent denies claimant suffered personal injury by accident arising out of and in the course of his employment from March 1, 2001 through April 1, 2001, and denies that proper notice was given to respondent by claimant.

The issues presented for the Board’s review are:

1. Did claimant provide timely notice of accident as required by K.S.A. 44-520?
2. Did claimant suffer injury by accident arising out of and in the course of his employment with respondent on the dates alleged?
3. Is so, what is the nature and extent of claimant’s injury and disability?
4. What is claimant’s average weekly wage?
5. Did claimant have a preexisting impairment of his back and/or upper extremities and, if so, is respondent entitled to a credit under K.S.A. 44-501(c)?

Before reaching these issues, the Board must first address the threshold question of claimant’s request for a remand of this matter to the ALJ.

### Findings of Facts and Conclusions of Law

Claimant contends that the record considered by the ALJ was incomplete. Claimant further contends that this omission cannot be rectified by the Board conducting a de novo review of the evidence, including the transcript of the March 3, 2003 continuation of the Albert E. Porter deposition.

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<sup>1</sup> K-WC E-1 Application for Hearing (filed Aug. 8, 2001).

The Claimant did not prepare a submission letter in this matter because by agreement of the parties, the matter was not ready for submission. The testimony of Al Porter, a Respondent witness, had not been completed. That Respondent's counsel was to inform the Court that Al Porter's deposition was not completed and had been reset, and made arrangement[s] for the extension of the terminal dates. The Respondent's counsel in fact had prepared a written agreement extending the terminal dates. The written agreement was forwarded to this office for review and execution and the written agreement was sent back to Respondent for proper filing with the Court. The Respondent inadvertently failed to tender the written extension to the Court.

In that regard, the Claimant would ask that this matter be resubmitted to the Administrative Law Judge for consideration of all the testimony of Al Porter.<sup>2</sup>

Respondent agrees that the March 3, 2003 deposition should be considered. At the commencement of that deposition there was the following colloquy between counsel:

Mr. Phalen: Before we go on, the respondent agrees that the parties had agreed that the terminal dates should be extended to cover today's deposition?

Mr. Streit: I'll agree to that and then if you'll agree, it sounds to me like I'm going to have to take some more rebuttal, though. We need to probably get Dan Seeber in here. I think that's his name, right?

The Witness: Randy Seeber.

Mr. Streit: Randy Seeber and the other gentleman.

Mr. Phalen: That's fine.

Mr. Streit: Okay.

Mr. Phalen: And we had sent you an order back on February 7<sup>th</sup> to extend it and it got lost in transit somewhere, as I understand it, is that true?

Mr. Streit: That's the way I understand it, and we've agreed to extend terminal dates to accommodate each party, correct?

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<sup>2</sup> Claimant's Submission Letter at 1 (April 17, 2003).

Mr. Phalen: Correct.

Mr. Streit: All right.

Mr. Phalen: We're finishing today's deposition because Mr. Marsh of Wallace Saunders had started the deposition without me being present and had asked some questions that I would like to object to now, specifically, any questions involving hearsay generally, responses by Mr. Porter, but specifically to the questions on page 6 of the deposition and page 7 where the responses were hearsay statements of Randy Seeber and Bob Arnce, A-R-N-C-E, concerning notice of the injury.<sup>3</sup>

Respondent is now unsure whether it wants to present additional testimony, but acknowledges there was an agreement by counsel to extend terminal dates and that the request was inadvertently not presented to the ALJ before the original terminal dates expired. Because this was not done the ALJ issued an Award on February 28, 2003.

**WHEREFORE**, the Appeals Board remands this claim to the Administrative Law Judge for reconsideration of the parties' request for an extension of terminal dates, to include the transcript of the March 3, 2003 continuation of the deposition of Albert E. Porter in the record, and for such further proceedings and relief as the court may deem appropriate.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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<sup>3</sup> Continued Evidentiary Porter Depo.(March 3, 2003) at 60-61.

c: William L. Phalen, Attorney for Claimant  
Janelle Jenkins Foster, Attorney for Respondent and Insurance Company  
Jon L. Frobish, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director